

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA08-960

FLASH MARKET, INC.
AIG CLAIMS SERVICES, INC.
APPELLANTS

V.

DEBORAH K. NORMAN
APPELLEE

Opinion Delivered February 25, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F602818]

AFFIRMED

WAYMOND M. BROWN, Judge

Appellants Flash Market, Inc., and AIG appeal the decision of the Arkansas Workers' Compensation Commission (Commission) affirming and adopting the decision of the administrative law judge (ALJ) awarding additional medical benefits and temporary-total disability benefits to appellee Deborah Norman. Appellants argue on appeal that there is no substantial evidence to support the Commission's decision. We find no error and affirm.

Appellee suffered a compensable injury on February 14, 2006,¹ while employed as store manager at Flash Market. As manager, appellee was required to make bank deposits for Flash Market. On the date of the injury, appellee had finished making a deposit and slipped and

¹This is the stipulated date of accident. Appellee testified that she sought medical attention the day following her injury and the record indicates that appellee was seen on February 14, 2006.

fell on her knees outside the bank. She was seen at Crittenden Memorial the following day and referred to Dr. Wilfred Onyia. Dr. Onyia referred appellee to Dr. Samuel Meredith. Dr. Meredith took x-rays and an MRI of appellee's left knee; however, he did not recommend surgery. Workmen's comp requested that appellee receive another opinion and scheduled her to see Dr. Riley Jones. Appellee was also referred to Dr. Terence P. Braden by one of the treating physicians. Appellee continued to see Dr. Jones until October 3, 2006, when he found her to be at maximum medical improvement (MMI) and discharged her. Appellee's workers' comp claim was closed following her discharge from Dr. Jones. Appellee presented to Dr. W. Lee Moffatt on October 10, 2006, complaining of left knee pain. After injections and other pain medication did not alleviate appellee's symptoms, Dr. Moffatt recommended surgery. Appellee had surgery on her left knee on February 21, 2007. Dr. Moffatt opined that appellee was at MMI on March 23, 2007. Appellee retained counsel and eventually sought a change of physicians on July 9, 2007. On July 25, 2007, appellee's request to change to Dr. Moffatt was entered. Following the change, appellee was seen by Dr. Moffatt on July 25, August 29, and September 12.

Appellants accepted appellee's injury as compensable. However, they contended that the treatment appellee received following her discharge from Dr. Jones was unreasonable and unnecessary. They further contended that appellee's treatment from Dr. Moffatt prior to July 25, 2007, was unauthorized. Appellants also controverted appellee's claim for temporary-total disability benefits. A hearing was held before the ALJ on November 8, 2007.

Appellee testified that following her injury, her knee was swollen and the pain from it kept her up all night. Appellee went to Crittenden the next day. She stated that she reported the injury to Flash Market but she was not referred to a physician. Appellee was seen by Dr. Onyia who referred her to Dr. Meredith. Dr. Meredith had appellee's left knee x-rayed and an MRI was taken. Appellee stated that Dr. Meredith did not recommend surgery. Appellee received a second opinion from Dr. Jones. According to appellee, her complaint was the same: a swollen and painful left leg. Appellee was also seen by Dr. Braden. According to appellee, Dr. Braden put her on Neurontin for RSD. Appellee stated that her knee did not get better until after her surgery. Appellee testified that there was an occasion when she was under Dr. Jones's care that she stepped out of the bathtub and hit her shin on the toilet because her knee gave way. Appellee stated she reported the incident to Dr. Jones; however Dr. Jones did not find any changes to her knee following this incident. Appellee insisted that she did not fall on her knee; she just hit her shin. According to appellee, her knee had given way prior to the bathroom incident. Appellee stated that Dr. Jones released her back to work and she worked approximately two days before she had to go to the emergency room for her left knee. Appellee stated that although Dr. Jones released her on October 3, 2007, she was still experiencing problems with her left knee. Appellee stated that Drs. Meredith, Braden, and Jones were all approved by workers' comp and that she saw Dr. Moffatt on her own.

According to appellee, she knew something was still wrong with her knee when she was first seen by Dr. Moffatt on October 10, 2006. Appellee testified that she had not re-

injured her knee between the time Dr. Jones discharged her and the time she first saw Dr. Moffatt. Appellee further stated that she had not done anything to any part of her leg since her initial compensable injury. Dr. Moffatt gave appellee injections in her knee, which she stated did not help. Appellee stated that Dr. Moffatt performed other tests on her before he made the decision to perform surgery on her left knee. Appellee stated that she did not ask worker's comp to pay for the treatment she received from Dr. Moffatt and filed it under her personal insurance. Appellee testified that she told Holly Dawson and Kevin Waller of Flash Market that she was going to see Dr. Moffatt and was planning to file it with her personal insurance. According to appellee, she was never offered additional benefits from Flash Market. Appellee's insurance had initially agreed to pay for her knee surgery but subsequently declined following the surgery. Appellee stated that the pain and swelling in her left knee deteriorated following her surgery. Appellee testified that after she hired an attorney, she sought a change of physicians. Appellee said that she had not worked anywhere since the two days she tried to work at Flash Market following her injury.

On cross-examination, appellee stated that she was in charge of other employees in her capacity as store manager. Appellee testified that if an employee was injured, they would report the injury to her. Appellee acknowledged that she was familiar with the process of filing workers' comp claims and that she filled out her own paperwork following her injury. According to appellee, when she returned to work following her injury she was sent to another location. Appellee had to perform physical tasks such as squatting down, climbing

ladders, and climbing on top of coolers in order to count items. Appellee stated that she was paid at her pre-injury rate.

On re-direct, appellee stated that she was constantly going to her physicians complaining of her symptoms and they were constantly unable to ascertain the origin of her problem. The underlying cause of appellee's symptoms was not discovered until she was having surgery. Appellee stated that she did not feel that she exaggerated her symptoms. Upon questioning by the court, appellee stated that she did not have any problems with her knees prior to her compensable injury. Appellee testified that she was familiar with the Form N, if it was the workers' comp form. She further stated that she did not know anything about changing physicians until after she secured an attorney.

Holly Dawson testified that she worked in payroll and human resources for Flash Market. Dawson stated that she provides all of the Flash Markets with workers' comp information. She stated that as store manager, appellee would have been responsible for posting the workers' comp poster in her store. According to Dawson, appellee returned to work for a couple of days in June. Appellee was terminated by Flash Market as of October 1, 2006, for not showing up to work. Dawson stated that appellee had not made any effort to return back to work. Dawson testified that had appellee returned, it was not her call what position appellee would have been placed in. On cross-examination, Dawson acknowledged that she was aware that appellee was going to see Dr. Moffatt because she said she was still having problems with her knee.

Medical reports of Drs. Jones, Meredith, Braden, and Moffatt were introduced during the hearing. According to the medical evidence, none of appellee's physicians could find an objective reason for her complaints. It was only after Dr. Moffatt ruled out several other issues did he decide to perform surgery on appellee's knee. The surgery revealed "an immediate appearance of an anterior horizontal tear of the medial meniscus extending from the anterior horn to the mid body....There was a small area of a grade 2 chondromalacia at the medial femoral condyle at the lateral wall where the torn portion of the meniscus was in contact and abrading that area. The retropatellar surface was intact, except for extensive grade 2 and mild grade 3 changes of chondromalacia on the medial facet of the retropatellar surface." Dr. Moffatt's progress note for February 28, 2007, indicated that appellee complained of moderate knee pain. The note from March 23, 2007, showed that appellee had reached MMI and could return to full employment. At the April 20, 2007 visit, appellee was discharged from care and told to return to the office on an as needed basis. Appellee presented to Dr. Moffatt on July 25, 2007, complaining of increasing pain. Appellee's medication was changed and she was told to start back wearing her brace. Appellee went to see Dr. Moffatt on August 29, 2007, due to pain. Appellee received an injection in her knee. Appellee continued to complain of knee pain at her September 12, 2007 visit with Dr. Moffatt.

The ALJ filed an opinion on January 23, 2008, granting appellee additional medical benefits, temporary-total disability benefits, and attorney's fees. Appellants appealed that

decision to the Commission. The Commission's July 14, 2008 opinion affirmed and adopted the ALJ's decision. This appeal followed.

In reviewing a decision of the Commission, we view the evidence and all reasonable inferences in the light most favorable to the findings of the Commission. *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003). The Commission's findings will be affirmed if supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*; see also *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm. *Linton v. Ark. Dep't of Correction*, 87 Ark. App. 263, 190 S.W.3d 275 (2004). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

Appellant appeals the Commission's decision to hold them accountable for appellee's medical bills from Dr. Moffatt prior to the effective date of the change of physicians. Appellants contend that although appellee did not sign a Form N at the time she reported her injury, as store manager she knew of its existence. Form N informs a claimant regarding her right to a change of physician under Ark. Code Ann. § 11-9-514 (Repl. 2002). Arkansas Code Annotated section 11-9-514(c) provides, "Any unauthorized medical expense incurred after the employee has received a copy of the notice [explaining the employee's rights and

responsibilities concerning change of physician] shall not be the responsibility of the employer.” Further, both Form N and the Workers’ Compensation Act provide that any non-emergency treatment or services furnished by any physician other than the ones selected in accordance to the foregoing shall be at the claimant's expense. See Ark. Code Ann. § 11-9-514(b).

The Commission found that appellants failed to provide appellee with Form AR-N outlining her right to change physicians following her compensable injury. It therefore found the change-of- physicians rules to be inapplicable during the time appellee received treatment from Dr. Moffatt between October 10, 2006 and July 9, 2007. Appellee’s testimony that she did not learn of the change-of-physician form until she obtained counsel was found to be credible. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Ark. Dep’t of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

Appellants also argue that medical services provided to appellee after October 3, 2006, were not reasonable or necessary. According to appellants, by that date, appellee had been seen by three physicians and none of them recommended surgery. Under Arkansas law, the employer must “promptly provide for an injured employee such medical, surgical ... services and medicine as may be reasonably necessary in connection with the injury received by the employee.” Ark. Code Ann. § 11-9-508(a) (Supp. 2007). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What

constitutes reasonably necessary treatment under the statute is a question of fact for the Commission to decide. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

The Commission evaluated the medical records of Dr. Moffatt and stated that those records reflected “a course of medical treatment to address the [appellee’s] complaint associated with her left knee injury.” The Commission found the treatments appellee received from Dr. Moffatt both prior to and subsequent to July 25, 2007, were reasonably necessary in connection to her compensable injury. It is the Commission’s duty to weigh the medical evidence, accepting or rejecting medical opinions as the fact-finder. *Jones v. Wal-Mart Stores, Inc.*, 100 Ark. App. 17, 262 S.W.3d 630 (2007). The question is not whether on this record we might have reached a different conclusion than the Commission, but whether reasonable minds could reach the Commission’s conclusion. *Id.* They could. The evidence shows that appellee consistently complained of swelling and pain following her compensable injury. Appellee’s doctors could not find an objective cause of her complaints because all of her MRIs were normal. The root of appellee’s symptoms was not apparent until she was having surgery. The Commission believed appellee when she said that she had no other injury to her knee subsequent to the initial injury. Therefore, its grant of additional medical benefits in the form of payment of past medical bills is affirmed.

Appellants also argue that the Commission should not have granted appellee temporary-total disability benefits from February 14, 2006, to March 23, 2007. Temporary-total disability is that period within the healing period in which an employee

suffers a total incapacity to earn wages. *Searcy Indus. Laundry, Inc. v. Ferren*, 92 Ark. App. 65, 211 S.W.3d 11 (2005). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit. *Id.* If the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id.* The determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.* The Commission relied on Dr. Moffatt's records indicating that appellee reached MMI on March 23. As such, no error occurred from the grant of TTD benefits. Accordingly, we affirm.

Affirmed.

ROBBINS and KINARD, JJ., agree.